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Supreme Court of California,

CANAVAN v. GRAY.

Where a statute gives to a person unlawfully in possession a right of action for a forcible entry by the true owner, that remedy is exclusive and he cannot maintain trespass for damages caused by such entry.

APPEAL from Superior Court, San Francisco, in an action of trespass in which the following facts appeared :

On the 19th day of August 1875, James Canavan, who was then the husband of the plaintiff, was the lessee and in the possession of the fifty-vara lot on the south-east corner of Third and Brannan streets, in San Francisco, and was the owner of all the frame buildings thereon ; and on that day he assigned said lease and sold said buildings to the defendant H. W. Gray. On the same day he signed and delivered to said Gray an instrument in writing, of which the following is a copy : " This is to certify that I have rented four rooms, upper story, S. E. cor. Third and Brannan sts., at (\$20) twenty dollars per month ; and I hereby agree to deliver up possession of the said rooms upon receipt of ten days' notice, said notice to take effect from 13th day of August 1875."

On the 26th of September 1875, said Gray commenced an action against said James Canavan for the possession of said premises, and on the 27th of the said month the latter went away, leaving his family, including his wife, the plaintiff herein, in said rooms. He has never occupied said rooms since. But the plaintiff has continued to occupy them without paying any rent for the use and occupation thereof.

On the 5th day of April 1879, some persons who had been employed by said Gray for that purpose, unroofed the house containing said rooms, and by so doing damaged the personal property of the plaintiff therein, and this action was brought to recover the damages which the plaintiff thereby sustained. Upon these and other facts, which do not change the legal aspect of the case, a verdict was rendered in favor of the plaintiff for \$1000. A motion for a new trial was made by the defendants, and denied by the court, on condition that the plaintiff should remit \$250 of the damages, which she did. From that order and the judgment defendant appealed.

William Reid, for appellants.

M. C. Hassett, for respondents.

The opinion of the court was delivered by

SHARPSTEIN, J.—The vital question is, can the plaintiff, upon these facts, maintain an action of trespass against the defendant? Upon that question the cases are conflicting, and we shall not attempt to enumerate them on the one side or the other, but will briefly examine the grounds upon which the opinions *pro* and *con* are based.

All agree that at common law the plaintiff could not, upon the facts disclosed by this record, maintain any action whatever against the defendants. It is also conceded that the only change which has been made in the law relating to this subject is that made by the statute which, in this state, as in many others, provides a summary remedy for forcible entry upon or into any real property. It is only as to the extent of the change wrought by this statute that there is any difference of opinion. The insistence on one side is that "the statute of forcible entry and detainer, not in terms, but by necessary construction, forbids a forcible entry, even by the owner, upon the actual possession of another. Such entry is therefore unlawful. If unlawful it is a trespass, and an action for the trespass must necessarily lie:" *Reeder v. Purdy*, 41 Ill. 279.

On the other side it is urged that the remedy given by the statute is exclusive. In this state the plaintiff in an action of forcible entry may recover the damages occasioned thereby, together with a judgment for the restitution of the premises. The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the Code of Civil Procedure, but it establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice: C. C. P. 4. An action of forcible entry would be a proceeding under the Code, and its provisions relating to that subject, in such a proceeding, would have to be liberally construed. But the Code has established the law of this state respecting that subject. It has provided a remedy and prescribed a course of procedure in cases of forcible entry. And all statutes, laws or rules on that subject heretofore in force in this state, whether consistent

or not with the provisions of the Code on the same subject, are repealed and abrogated: *Id.* 18.

It is doubtless the duty of courts in actions of forcible entry to construe the provisions of the Code relating to that subject so as to suppress the mischief and advance the remedy—that is, the *remedy given by the statute*. The legislature has provided a remedy for forcible entry, no matter by whom made. But it has provided only one remedy. Before there was any legislation on the subject a person in the actual rightful or wrongful possession of real estate could maintain trespass against any one, *not having a right to enter*, for a forcible entry upon it. A person in the wrongful possession could not maintain an action against the owner, having a right to enter, for a forcible entry. But the statute gives a person, even in the wrongful possession, a right of action, and prescribes its form, against the owner having a right to enter, if he make a forcible entry. Neither expressly nor by necessary implication does the statute give to a person in the wrongful possession the right to maintain any other than the action of forcible entry when such entry is made by the owner, having the right to enter. The legislature has provided a particular remedy for a forcible entry made under such circumstances, but we are unable to see upon what principle it can be held that another and different remedy, and one which did not exist at common law, and is not given by statute, is equally available in such a case.

That the legislature, by giving a person in the wrongful possession of the real estate of another the right to bring an action of forcible entry against him for entering forcibly upon that which he had a right to enter upon, impliedly gives a right to maintain trespass in such a case, is at best a very doubtful implication, and the rules of the common law are not to be changed by doubtful implication. *Wilbur v. Crane*, 13 Pick. 284.

As the evidence shows that the premises upon which the alleged trespasses were committed were owned by the defendant, H. W. Gray, and that he was entitled to the immediate possession of the same, and that the plaintiff was in the wrongful possession thereof, the defendant's motion for a new trial should have been granted, on the ground that the evidence was insufficient to justify the verdict. The case was tried upon what we deem to be an erroneous theory, and the errors committed by the court in the course of the trial are attributable to that fact. If the theory upon which the case was

tried had been the correct one, none of the exceptions could be sustained. It is, therefore, unnecessary to dwell further upon them.

Judgment and order reversed.

The reasoning of the court in the principal case is clear and concise, "The legislature has provided a remedy for forcible entry, no matter by whom made. But it has provided only one remedy," and "we are unable to see upon what principle it can be held that another and different remedy, and one which did not exist at common law, and is not given by statute, is equally available in such a case."

The right of one actually in possession of land to redress for being turned out of the same, and for injuries received in resisting an attempt on the part of the rightful owner to regain possession, has been the subject of numerous decisions both in England and the United States.

Some confusion has arisen in the law from the different views taken of the action of trespass and the count for violence usually inserted in the declaration. While an action of trespass *quare clausum*, &c., lies under certain circumstances for an eviction, the force and violence to the person has been regarded either as a matter of aggravation, as in *Davison v. Wilson*, 11 A. & E. (N. S.) 890, or a distinct tort, as in *Newton v. Harland*, 1 M. & G. 644.

In England, it was undoubtedly the law that a party in possession might maintain that possession, no matter how obtained, against any but the rightful owner, but that such owner could enter on his land at all times. The result of these principles was seen in the conduct of the owners of land who in the language of the statute 5 Ric. II., sect. 1, cap. 8, made entry with strong hand or with multitude of people. The above statute was accordingly passed to remedy this evil, and it enacts that none from henceforth make any entry into any lands or tenements, but in case where entry is

given by law, and in such case not with strong hand nor with multitude of people, but only in peaceable and easy manner, and if any man from henceforth do to the contrary and be thereof duly convicted, he shall be punished by imprisonment, &c. This statute was followed by 15 Ric. II., cap. 11, 8 H. VI., cap. 9, which gave restitution to the party dispossessed. 31 Eliz., cap. 11, and 21 Jac. I., cap. 15, which gave restitution upon inquest found to tenants for years.

All of these statutes impose a penalty upon persons guilty of the offences therein described (1 Hawk. P. C. 280), but provide no civil remedy for the party dispossessed except restitution after inquest found, or upon conviction of the forcible entry and detainer, and then only to parties having a right, as tenants of the freehold or tenants for years. Where a landlord therefore entered and ousted a tenant who overheld, *liberum tenementum*, was held to be a good plea in an action of trespass *quare clausum*: *Taylor v. Cole*, 3 T. R. 292; *Taunton v. Costar*, 7 Id. 431. This last has always been considered as a leading case; in it KENYON, J., uses the following language: "The case is too plain for argument. Here is a tenant from year to year whose term has expired upon a proper notice to quit, and because he holds over in defiance of law and justice, he now attempts to convert the lawful entry of his landlord into a trespass. If an action of trespass had been brought it is clear that the landlord could have justified under a plea of *liberum tenementum*."

Turner v. Meymott, 1 Bing. 158, goes a step further; the court in that case say that if the landlord use force in ousting his tenant, that is an offence against the public for which he may be indicted, but is no ground for an action of trespass.

The landlord once in possession, no matter how gained, could maintain trespass : *Butcher v. Butcher*, 7 B. & C. 399.

The right of the landlord to use force in obtaining possession was first expressly denied in *Hilary v. Gay*, 6 C. & P. 284. The facts in that case were as follows : The defendant, the landlord, after getting the plaintiff away procured a number of men who entered plaintiff's room and turned his wife into the street. Lord LYNDBURST says, " Even if plaintiff had promised to go away, I am of opinion that the conduct of the defendant cannot be justified. If the defendant had a right to the possession he should have obtained that possession by legal means."

In *Newton v. Harland*, 1 M. & G. 644, a case which was three times tried and argued very fully, the majority of the court, PARKE and ALDERSON dissenting, held that defendant having entered by force and turned out plaintiff's wife and family, and in so doing assaulted the wife, could not justify the acts done in defence of his possession of the house, because the entry was unlawful. PARKE, B., expresses his disapproval of this doctrine in *Harvey v. Brydges*, 14 M. & W. 437, as follows : " The next point was raised in *Newton v. Harland*, and if it were necessary to decide it I should have no hesitation in saying that where a breach of the peace is committed by a freeholder who, in order to get possession of his land, assaults a person wrongfully in possession of it, against his will, although the freeholder may be responsible to the public, in the shape of an indictment, he is not liable to the other party." *Harvey v. Brydges*, is followed in *Lows v. Telford*, 1 App. Cas. 425, while *Newton v. Harland* is questioned in *Davis v. Burrell*, 10 C. B. 821. In *Pollen v. Brewer*, 7 C. B. (N. S.) 371, it is held that no damages can be recovered for the eviction itself, while *Davison v. Wilson*, 11 A. & E. (N. S.) 890, decides that a landlord could justify on a plea of *liberum tenementum*, unless more force was used than

was necessary. In *Beddall v. Maitland*, 17 Ch. D. 174, the court reviews these cases, and reconciling the difference, slays down as the principle enunciated by *Newton v. Harland*, 1st. That in respect of a claim for forcible entry and eviction a plaintiff cannot recover ; but 2d. That whenever, in course of a forcible entry there has been committed by the person who has forcibly entered an independent wrong, some act which could have been justified only if he was in lawful possession, the landlord is liable for such act in damages. The facts in *Beddall v. Maitland* afford an excellent illustration of the above distinction. The defendant was in possession of the house under a license from the owner, which had been revoked ; plaintiff made a forcible entry under the statute 5 Ric. II., and defendant made two counterclaims, one for the forcible entry and eviction, the other for injury done to his furniture, which had been thrown into the street. The first claim was not allowed, but in respect to his claim for the injury done his furniture it was held he might recover.

This may be taken as the result of the English authorities that there is no civil remedy given by statute save restitution upon inquest found, and that to a person having a title to the land. That an action of trespass cannot be maintained for the eviction, even if accompanied by force, but that recovery may be had in such case for injuries done to the person of the tenant holding over or his personal property by the landlord, when, as FRY, J., says, in *Beddall v. Maitland*, the act could be justified only if the landlord was in lawful possession.

In this country the necessity of providing a civil remedy for those who have been turned out of possession by the forcible entry of another has been realized by many of the states, and acts have been passed at different times by the majority of them with that end in view ; some states, however, have either simply retained the English statutes above men-

tioned, or combined them into one, as in Pennsylvania (Acts of 1860, Pamph. L. 390). While the effect of a statute giving a civil remedy has modified the doctrine of the English law considerably, many cases have arisen presenting the same questions as those already mentioned. This has taken place either in some state which had not passed an act giving a civil remedy for a forcible entry, or where the plaintiff, ignoring such remedy, has sought to recover in trespass for the eviction and injuries accompanying it.

A brief review of the cases will show how nearly the American decisions accord with the law as laid down in *Beddall v. Maitland*.

The leading cases are *Wilde v. Cantillon*, 1 Johns. Cas. 123, and *Hyatt v. Wood*, 4 Johns. Rep. 150. The facts in this last much cited case were as follows: Plaintiff was in possession under an agreement to vacate, and the time had expired. Defendant, the owner, came on the land, where plaintiff was mowing the grass, ordered him to leave the premises and struck him with a whip. The court in their decision says, "If the entry in such case be with a strong hand or a multitude of people it is an offence for which the party entering must answer criminally, but it would be an absurdity to say that he must also be responsible in damages for an injury to the person who has no right, but is himself a wrongdoer in consequence of his illegal entry." This case has always been followed in New York: *Ives v. Ives*, 13 Johns. 235; *Jackson v. Morse*, 16 Id. 197; *Willard v. Warren*, 17 Wend. 758; and as late as the case of *Bliss v. Johnson*, 73 N. Y. 529, its doctrine is cited with approval.

That was a case where defendants offered to prove that they owned a certain strip of land on the highway; plaintiff cut grass on it, left it to dry, and defendant coming on the land took away the hay; plaintiff attempted to resist and a scuffle ensued. The court say, "upon

the assumption that he held the title, defendant had a right at any time to enter on the highway, take possession of the hay and appropriate it to his own use, and an action of trespass would not lie against him, although the entry was by force, citing *Hyatt v. Wood*. This case is important as showing that the doctrine of *Hyatt v. Wood* is not shaken by the adverse criticisms in the Vermont and Illinois cases.

This case has been generally followed in the other states: *Brown v. Cam*, 1 N. H. 169; *Sterling v. Warden*, 51 Id. 219; 52 Id. 197; *Meader v. Stone*, 7 Met. 147; *Com. v. Haley*, 4 Allen 318; *Miner v. Stevens*, 1 Cush. 485; *Clark v. Keliher*, 107 Mass. 406; *Overdier v. Lewis*, 1 W. & S. 90; *Muldrow v. Jones*, 1 Rice 64; *Johnson v. Hannahan*, 1 Strobhart 313; *Tribble v. Frame*, 7 J. J. Marsh. 599. And although it is doubted in *Larkin v. Avery*, 23 Conn. 304, the latter case did not turn on that point; and in the case of *Bliss v. Bange*, 6 Conn. 78, cited as an authority, DAGGETT, J., says, "The (Connecticut) statute gives the action of trespass in so many words to the party aggrieved, and the party aggrieved is by irresistible implication the person forcibly ejected."

But the distinction taken in *Newton v. Harland*, as explained in *Beddall v. Maitland*, seems to have obtained in most of the American decisions. Thus in *Sampson v. Henry*, 13 Pick. 36, "The next question is whether the facts proved amount to a defence for the *personal* injury complained of. It has been argued that this is only a matter of aggravation, but we consider it a distinct injury: *Overdier v. Lewis*, *supra*; *People v. Field*, 52 Barb. 198.

In most of the cases the converse of the proposition is stated, viz.: That a landlord must not use more force than is necessary: *Winter v. Stevens*, 9 Allen 526; *Pratt v. Farrar*, 10 Id. 519; *Sterling v. Warden*, 51 N. H. 219; *Clark v. Keliher*, 107 Mass. 406; *Flaherty v.*

Andrews, 2 E. D. Sm. 529. Although in some cases it is said that the gist of the action is injury to the possession of the real estate, and the alleged trespass on the person is only matter of aggravation: *Merriam v. Willis*, 10 Allen 118, which is the doctrine of *Taylor v. Cole*, *supra*.

With the exceptions to be mentioned below, the cases in this country where the landlord has entered peaceably and being in possession either turns the tenant out by force or uses sufficient force to prevent a re-entry, hold that at common law the tenant has no redress, and that the statutes give no remedy unless the force as above stated is unreasonable: *Mussey v. Scott*, 32 Vt. 82; *Clark v. Keliher*, 107 Mass. 406; *Sterling v. Adams*; *Tribble v. Frame*, 7 J. J. Marsh 599.

When the landlord is in possession he may bring trespass against his former tenant: *Mussey v. Scott*, *supra*; may oust such tenant upon his attempting to regain possession: *Dennis v. Wood*, 48 Cal. 361; or may bring a complaint under the statute: *Sage v. Harpending*, 49 Barb. 166.

The cases which have excited most discussion are those where the landlord, in regaining possession, used force or used great violence in ousting the tenant. The case of *Dustin v. Cowdry*, 23 Vt. 635, is one of the latter. There the landlord having entered peaceably turned the tenant out forcibly into the street in the winter. *Reeder v. Purdy*, 41 Ill. 279 (6 Am. Law Reg. N. S. 104), where the landlord seized plaintiff's wife by the wrists and turned her out and put the furniture out in the street. The court relying on *Dustin v. Cowdry*, held that an action of trespass would lie, although in both cases there was a statutory remedy, on the ground that the statute having forbidden a forcible entry (which they held this to be), such entry is unlawful. If unlawful, it is a trespass and an action will lie. These cases are approved in *Whittaker v. Perry*, 38 Vt. 107, and the

court rely on *Newton v. Harland* as sanctioning the correctness of their view of the force of the statute: *Farwell v. Warren*, 51 Ill. 467.

In Pennsylvania, in *Adams v. Adams*, 7 Phil. 160, Judge STROUD appears to think that *Overdier v. Lewis* might have been differently decided if the decision in *Newton v. Harland* had been known, but the later cases in other states do not seem to have greatly varied from the law as laid down in *Hyatt v. Wood*, *supra*.

In California, the earlier cases seem to regard the civil remedy provided by the statute as exclusive. Thus in *House v. Keiser*, 8 Cal. 499, it is said to be in derogation of the common law and a party must bring himself clearly within its requirements: *Opera House v. Bert*, 52 Cal. 471; *Henstreet v. Wassum*, 49 Id. 273.

In Missouri, *Fuhr v. Dean*, 26 Mo. 116, which follows *Krewett v. Meyer*, 24 Id. 107, while asserting the doctrine of *Wilde v. Cantillon*, and *Taunton v. Costar*, *supra*, that the common law affords no civil remedy, holds that the injured party must appeal to the statutory remedy: *Fletcher v. Keyte*, 66 Mo. 218. In *Schaumaffel v. Belm*, 77 Ill. 567, it is said that the act of forcible entry and detainer being in derogation of the common law must be strictly construed. With the exception of the Vermont and Illinois cases above cited (*Dustin v. Cowdry*, *Reeder v. Purdy*, *Whittaker v. Perry*, and *Farwell v. Warren*), the law in America, as well as in England, seems to be well settled as regards the rights of tenants holding over.

An interesting discussion of these last named cases is to be found in the 4 Am. Law Rev. 429, but at that time the case of *Beddall v. Maitland* had not been decided, and the writer treats the doctrine of *Newton v. Harland* as entirely exploded.

The result of the American decisions seems to be that where a statutory civil remedy is given the complainant must

bring himself within the requirements of the statute and pursue that remedy : that where such remedy is not given no action of trespass will lie for an eviction of a tenant holding over, although necessary force is used. That if the landlord used violence in gaining possession or ousts the tenant at sufferance with unnecessary

force an action of trespass will lie. And that for the injuries inflicted on the person of the tenant, and damage done to his personal property a landlord is responsible. This is in harmony with the law as laid down in the later English cases.

W. DRAYTON.

Philadelphia.

Circuit Court, Southern District of Ohio.

McCOY v. C., I., ST. L. & C. RAILROAD COMPANY.

Railroad corporations are *quasi* public corporations, dedicated to the public use. In accepting their charters they necessarily accept them with all the duties and liabilities imposed upon them by law. Thus a *quasi* public trust is created which clothes the public with an interest in the use of railroads, and the latter can be controlled by the courts to the extent of the interest of the public therein.

In the absence of some statute providing another and different remedy, courts of equity have jurisdiction to compel railroad corporations to discharge the duties imposed upon them by law ; and persons injured by the wrongful action or non-action of such corporations may seek redress by injunction, and are not bound to resort to proceedings in *mandamus* or to an action at law for damages.

A railroad company cannot bind itself to deliver to a particular stock-yard all live stock coming over its line to a certain point, but it is bound to transport over its road and deliver to all stock-yards at such point, reached by its tracks or connections, all live stock consigned, or which the shippers desire to consign to them, upon the same terms and in the same manner as under like conditions it transports and delivers to their competitors ; and the performance of this duty may be compelled by injunction at the suit of the proprietor of the stock-yards discriminated against.

Where foreign corporations engage in business in a state whose laws provide that they may be summoned by process served upon an agent in charge thereof, they are "found" in the district in which such agent is doing business, within the meaning of the act of Congress of March 3d 1875 (18 St. at Large, 470), and may be served in that manner in suits brought in the United States courts.

IN EQUITY. Motion for preliminary injunction.

Ramsey & Matthews, for complainant.

Hoadley, Johnson & Colston, for defendant, Cincinnati, Indianapolis, St. Louis & Chicago Railroad Company.

Paxton & Warrington and *Stallo, Kittredge & Shoemaker*, for defendant, United Railroads Stock-Yards Company.